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Supreme Court, U.S.
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NO. 08-691

IN THE

SUPREME COURT OF THE UNITED STATES

CALVIN DAVID FOX,

Petitioner,

vs.

SECURITIES EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR CERTIORARI TO THE
U.S. COURT OF APPEALS
FOR THE DISTRICT OF
COLUMBIA CIRCUIT

PETITION FOR REHEARING

CALVIN DAVID FOX
Post Office Box 7900
Jupiter, Florida 33468
(954) 383-5943

STATEMENT OF ISSUES

1. With no further labor, this Court has jurisdiction to remand for further proceedings consistent with the unanimous decision in, **Crawford v. Metropolitan Government of Nashville and Davidson County**, ____ U.S. ____ Case 06-1595 (January 26, 2009) with regard to Congressional intent and the "primary objective" and statutory scheme of The Securities Exchange Act of 1934, Section 19(d), Title 15, Section 78s(d)(2), to avoid harm to an employee by providing a right to seek review of a Notice of Discipline after **receipt**, as a minimum standard of fundamental due process, which Congress imposed in exchange for allowing the New York Stock Exchange to continue as a Self Regulating Organization (SRO), and which supersedes the insertion of an intervening lesser standard of due process for review by the NYSE.

2. With no further labor, this Court has jurisdiction to vacate the present dismissal of the supplemental third Notice of Discipline upon the face of the record, where the supplemental third Notice of Discipline recites that it is only supplemental to the September 10, 2004 second Notice of Final Discipline, which Fox obtained timely review of by the NYSE Board and Fox's good faith effort to seek review of the September 10, 2004 Notice of Discipline by the SEC was returned by the SEC because NYSE review of the September 10, 2004 Notice of Discipline was ongoing.

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The opinion of the United States Circuit Court of Appeals, for the District of Columbia, dated March 26, 2008, is reported in West's electronic case reporting system, as Fox v. SEC, 2008 West Law 1885426 (D.C. Cir. March 26, 2008).

JURISDICTION

On January 12, 2009, the Court entered an order in this cause denying certiorari. The Petitioner invokes the Court's authority under Rule 44 to rehear the denial of certiorari based upon the intervening unanimous decision of this Court in **Crawford v. Metropolitan Government of Nashville and Davidson County**, ___ U.S. _____ Case No. 06-1595 (January 26, 2009) and substantial grounds not previously presented.

Without any further labor, this Court has jurisdiction to remand for further proceedings consistent with Crawford with regard to express Congressional intent and the primary objective of The Securities Exchange Act of 1934, Section 19(d), Title 15, Section 78s(d)(2), of avoiding harm to an employee by providing a right to seek review of a Notice of Discipline after **receipt,** as a minimum standard of fundamental due process, which Congress imposed in exchange for allowing the New York Stock Exchange to continue as a Self Regulating Organization (SRO), and which supersedes the insertion of an intervening lesser standard of due process for review by the NYSE.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The due process clause, Amendment V of the United States Constitution, provides that:

> "No person . . . shall be deprived of life, liberty, or property, without due process of law;"

The Securities Exchange Act of 1934 Section 19(d), Title 15 Section 78s(d)(2) provides **inter alia**, that:

> "(2) Any action with respect to which a self-regulatory organization is required by paragraph (l) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine."

Legislative History, 1975 U.S. Cong. Admin. News 179, at 203, P.L. 94-29, provides Congress' intent that Section 19(d) provides the minimum fundamental due process required of self-regulating organizations:

> "Recognizing that the self-regulatory organizations utilize governmental-type powers in carrying out their responsibilities under the Exchange Act highlights the fact that these organizations must be

required to conform their activities to fundamental standards of due process."

NYSE Rule 476(d) provides that:

"Service shall be effective by [1] personal service of such Charge Memorandum, or [2] by leaving same either at the respondent's last place of residence as reflected in Exchange records, or [3] upon mailing same to the respondent at the aforesaid office address or place of residence." [Enumeration added].

SUMMARY OF RELEVANT FACTS FOR REHEARING

The facts recited herein are not in dispute. In August of 1999, the Petitioner, Calvin David Fox (hereinafter Fox) obtained a series 7 license as a Financial Advisor for the New York Stock Exchange (NYSE) and began working at Prudential Securities in Fort Lauderdale. Within a month, Fox made a complaint to his employer, that account practices of Prudential Securities amounted to money laundering. On February 7, 2000, based upon one (1) fifteen minute conversation with a company attorney on January 11, 2000 about the effects of a Florida Rule of Appellate Procedure, Prudential fired Fox. Fox's complaint of money laundering resulted in at least one federal investigation by U.S. Customs.

In 1975 Congress created Section 19(d) [Title 15, Section 78s(d)] requiring **receipt** of Notices of Discipline as "fundamental due process" for aggrieved persons disciplined by the NYSE, in

exchange for allowing the NYSE to be a self regulating organization (SRO). Legislative History of Securities Act of 1934 Amendments 179, at 203, P.L. 94-29 [creating Section 19(d)].

On October 31, 2003 the Securities Exchange Commission (SEC) reversed the first Notice of Discipline against Fox in the case at bar. **Fox v. New York Stock Exchange**, SEC Case No. 3-11062 (October 31, 2003). A second Notice of Discipline was therefore issued on September 10, 2004 and affirmed by the Board of the NYSE on April 7, 2005. P1. Fox sought to appeal the Board decision and second Notice of Discipline. P1. However, the SEC returned the papers upon the NYSE representation that the NYSE proceedings upon the 2003 remand from the SEC and the second Notice of Discipline were still pending. P2. On March 26, 2006, a supplemental third Notice of Discipline against the Petitioner was issued, specifically reciting that it was, only a supplement to the September 10, 2004 Notice of Discipline, which the NYSE had affirmed. P3.

The letter Notice submitted for the supplemental third Notice of Discipline, had a private postal meter mark of March 31, 2006 and the author provided a copy of Section 19(d) of the Securities Exchange Act of 1934 as the authority for SEC review of the supplemental third Notice of Discipline. Fox **received** the letter regarding the supplemental third Notice of Discipline on **April 6, 2008**, Twenty one (21) days later on **April 27, 2006**, Fox filed a demand for review.

The NYSE Board dismissed Fox's demand for review of the supplemental third Notice of Discipline as untimely, under the third part of NYSE Rule 476(d) reciting that Fox was "given" the supplemental third Notice of Discipline twenty-seven (27) days earlier, on March 31, 2006, the date inked by the NYSE private postal meter. NYSE Rule 476(d) only allows twenty-five (25) days to seek review of a Notice of Discipline.

The SEC also dismissed Fox's appeal of the first, second and supplemental third Notices of Discipline, saying that Fox was bound by the NYSE interpretation of its Rule 476(d) which in the third part allows "service" of a Notice of Discipline to be effective upon mailing and review under Rule 476(d) review must be sought with twenty-five days.

On appeal to the U.S. Court of Appeal for the District of Columbia Circuit, the Court also deferred to the NYSE interpretation of its Rule 476(d) that under the third part of Rule 476(d) service of a Notice of Discipline was effective twenty-five (25) days after the inked date of the NYSE private postal meter, and receipt was not necessary to commence the time to seek review of a Notice of Discipline. **Fox v. Securities and Exchange Commission**, 2008 W.L. 1885426 (D.C. Cir. March 26, 2008).

REASONS TO GRANT REHEARING

In Crawford v. Metropolitan Government of Nashville and Davidson County ____U.S. _____ Case No. 06-1595 (January 26, 2009), this Court unanimously overturned the Circuit Court Rule,

which allowed an employee to be fired notwithstanding the "antiretaliation" provision in Title VII of the Civil Rights Act of 1964. This Court apparently based its unanimous reversal upon the statutory analysis that:

> "The Circuit's rule could undermine [substantive decisions] along with the statute's primary objective of avoiding harm to employees . . ." [citations omitted]. Slip Opinion Syllabus at p. 2.

[The Syllabus was the only documentation of this Court's opinion available before printing this Petition].

I.

In the case at bar, as in **Crawford**, the dismissal of Fox's effort to obtain review of the supplemental third Notice of Final Discipline, undermines the scheme intended by Congress in Section 19(d) to protect employees with "fundamental" standards of due process for review of Notices of Discipline, where Congress traded the imposition such minimal fundamental constitutional standards in exchange for the New York Stock Exchange remaining as a self regulating organization. Legislative History, 1975 U.S. Cong. Admin. News 179, at 203, P.L. 94-29. The Circuit Rule allowing the NYSE to interpose an intervening lesser Agency standard for due process in the face of plain Congressional intent to the contrary, defeats the statutory scheme to protect Fox as an employee and his right to seek lawful review of the supplemental third Notice of Discipline under what

Congress has determined are fundamental standards of fairness and due process. Without any further labor, this Court may therefore vacate and remand this cause for further proceedings consistent with **Crawford Metropolitan Government of Nashville and Davidson County**, ____ U.S.___, Case No. 06-1595 (January 26, 2009).

II.

Moreover, as Fox argued throughout the proceedings below, the supplemental third Notice of Final Discipline did not constitute a separate proceeding from the timely NYSE Board review, which Fox had already obtained and concluded upon the second Notice of Discipline. The supplemental third Notice of Discipline, which Fox provides herein, recites that it is no more than the continuation of the existing timely process initiated by the Petitioner, to wit:

> "The following statement is intended to supplement the previous decision issued by this Hearing Panel, dated September 10, 2004. (copy attached)." P3.

The September 10, 2004 second Notice of Discipline was sustained upon all grounds by the NYSE, but, having already been stung by the SEC for insufficient findings in 2003, remanded to itself for more negative findings. The supplemental third Notice of Discipline therefore just piled on more negative findings.

Sub judice, the Petitioner already had in place timely review of the September 10, 2004 second Notice of Discipline, which the NYSE had affirmed and remanded to itself for more negative findings. Fox's timely Notice of Appeal to the SEC from the NYSE Board decision affirming the September 10, 2004 second Notice of Discipline was simply mailed back to Fox by the SEC, because the NYSE contended in its written submission to the SEC that Fox's timely review of the September 10, 2004 Second Notice of Discipline, was not yet final and no appeal to the SEC was necessary. P1-P2.

Therefore, inasmuch as this cause was plainly traveling upon the timely review obtained by Fox upon the NYSE Board review of the September 10, 2004 second Notice of Discipline, and the author of the supplemental third Notice of Discipline and the NYSE acknowledges it is no more than a supplement to an existing timely review obtained by Fox, the present dismissal by the NYSE in a cause where Fox had already obtained timely review, under anyone's standard is shockingly unlawful and a denial of due process. Without any further labor, this Court may therefore vacate this cause for further proceedings upon the obvious effect of the record.

III.

The Petitioner, Fox, has been unemployed with all the negative consequences thereof since February 7, 2000 as the result of the unlawful NYSE action herein, notwithstanding the reversal upon the merits for lack of sufficiency by the SEC on October 31, 2003. The Petitioner has diligently sought timely

review of this cause for nine (9) years in order to regain lawful employment. Without the illicit dismissals herein, Fox would have been gainfully employed and able to support his family and obligations. Without this Court's intervention, this cause is at an end and the retaliatory firing of Fox on February 7, 2000 is a death sentence to his right to work and support his family.

With no further labor, this Court may vacate and remand this cause for further consideration in light of **Crawford v. Metropolitan Government of Nashville** and thereby uphold the statutory scheme of minimum fundamental constitutional rights intended by Congress to protect employee rights to obtain review of Notices of Discipline by the New York Stock Exchange in exchange for the NYSE remaining as a Self Regulating Organization.

With no further labor, this Court may also vacate and remand the present dismissal upon the face of the record, in that the supplemental third Notice of Discipline recites that it is only supplemental to the September 10, 2004 second Notice of Discipline, which Fox obtained timely review of and which was affirmed upon all grounds by the NYSE, which only remand the proceedings to itself for more negative findings because of the 2003 reversal by the SEC for insufficient findings.

Finally, with no further labor, this Court may cause one less person to be unemployed in this dismal economy, which unemployment is permanent if the Court leaves the present injustice standing.

CONCLUSION

WHEREFORE, upon the foregoing and such other terms as this Court deems just, the Petitioner, CALVIN DAVID FOX, prays that this Petition for Rehearing be granted and that this cause will be remanded for further proceedings consistent with **Crawford v. Metropolitan Government of Nashville and Davidson County**, _____ U.S. _____ Case No. 06-1595 (January 26, 2009) and remanded upon the face of the record which provides that the third Notice of Discipline is supplemental to the September 10, 2004 second Notice of Discipline, upon which Fox had obtained and conducted timely review by the NYSE.

CALVIN DAVID FOX
Post Office Box 7900
Jupiter, Florida 33468
(954) 383-5943

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY, that the foregoing Petition for Rehearing is submitted in good faith upon circumstances of a substantial or controlling effect and upon grounds not previously presented to the Court and is not presented for hindrance or delay.

CALVIN DAVID FOX

INDEX TO APPENDIX OF PETITION FOR REHEARING

[Excerpt] Letter on Fox's Notice of Appeal From NYSE decision on April 7, 2005 affirming September 10, 2004 second Notice of Discipline P1

[Excerpt] SEC letter returning Fox's Notice of Appeal And Motion to Remand of NYSE Board Decision on April 7, 2005, affirming September 10, 2004, second Notice of Discipline P2

[Excerpt] supplemental third Notice of Discipline March 27, 2006 ..... P3

[Excerpt of Fox letter on Fox Notice of Appeal and Motion to Remand of April 5, 2005 NYSE decision affirming September 10, 2004 Notice of Discipline]

CALVIN DAVID FOX
P.O. Box 7900
Jupiter, Florida 33468

May 5, 2005

Margaret McFarland
Deputy Secretary SEC
U.S. Securities and Exchange Commission
450 5th Street Northwest
Washington, DC 20549-0609

Re: Fox v. NYSE
SEC Case No. 3-11062
NYSE Case No. 02-110

Ms. MacFarland:

Enclosed is a.) my Notice of Appeal After Remand **submitted out of an abundance of caution** with regard to the above referenced case, which was previously **reversed** by the SEC for further findings below by the NYSE; b.) a copy of the NYSE Board decision issued on April 7, 2005 and served upon the undersigned on April 8, 2005; and c.) my Motion to Remand to the NYSE to facilitate the NYSE attempt to remand to the panel....

* * *

Very truly yours,

CALVIN DAVID FOX

Cc: NYSE.

[Excerpt] SEC Response to Fox's Notice of Appeal and Motion to Remand of NYSE Board decision on April 7, 2005, on the September 10, 2004 Notice of Discipline

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

Office of the Secretary

Administrative Proceeding
FILE NO. 3-11062

May 11, 2005

Mr. Calvin David Fox
P.O. Box 7900
Jupiter, Florida 33468

Dear Mr. Fox:

This office received on May 6, 2005 your Notice of Appeal After Remand and Motion to Relinquish Jurisdiction. Since this proceeding is still pending before the New York Stock Exchange, there is no decision the Commission can review under Section 19 of the Securities Exchange Act of 1934. Therefore we are returning your documents to you.

Sincerely,

Jonathan G. Katz
Secretary

Cc: Mary Yeager,
NYSE

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[Excerpt of supplemental third Notice of Discipline]

NEW YORK STOCK EXCHANGE

March 27, 2006

Exchange Hearing Panel Decision 02-110
CALVIN DAVID FOX
FORMER REGISTERED REPRESENTATIVE

DECISION UPON REMAND FROM BOARD OF DIRECTORS

Appearances:

For the Division of Enforcement	For Respondent
Steven F. Korostoff, Esq.	Calvin David Fox
Steven M. Tanner, Esq.	pro se

Procedural History

* * *

The following statement is intended to supplement the previous decision issued by this Hearing Panel, dated September 10, 2004. (copy attached).

* * *